R. SAMBASIVAM v. PUBLIC SERVICES COMMISSION & ANOR.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.J.J.) September 10, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 18 of 1969]

Administrative Law — Certiorari — Termination of service of public officer — Rules of natural justice — Reasonable opportunity of being heard — Bias — General Orders — Effect of.

This was an appeal against the dismissal by Raja Azlan Shah J. ([1969] 1 M.L.J. 219) of a motion for *certiorari* to quash the decision of the Public Services Commission terminating the appellant's appointment. It was contended for the appellant: (1) the proceedings being instituted by the Secretary to the Ministry of Labour and not by the Head of Department was *ultra vires* the provisions of General Order 38 and therefore void; (2) the committee of inquiry had failed to inform the applicant of its decision on the question of jurisdiction and this was a serious procedural defect; (3) the Public Services Commission was possibly influenced by extraneous considerations without giving the applicant an opportunity to explain them thereby violating the rules of natural justice; (4) the committee of inquiry had admitted and acted on hearsay evidence.

Held, dismissing the appeal: (1) the learned trial judge was right in holding that although the procedural provisions in the General Orders were mandatory, and must be strictly construed, the phrase "appears to the Head of Department to merit dismissal" which precedes those provisions is only a machinery providing for the mode in which the question is to come before the disciplinary authority; and therefore in this case the proceedings were not invalid although they were initiated by the Secretary to the Ministry of Labour who is at least equal in official status to the Head of Department;

(2) the committee of inquiry in this case did consider the collateral question of jurisdiction and its failure to convey its decision to the applicant was not a breach of the rules of natural justice;

(3) although there were allegations in the letter of the Secretary to the Ministry of Labour which contained allegations of misconduct against the appellant which were not made the subject matter of charges proferred against him, there was no reason to doubt in this case that neither the committee nor the Public Services Commission was influenced in their decision by anything contained in that letter and therefore there was no evidence of a real likelihood of bias;

(4) the court was not justified in rejecting the inferences drawn by the committee of inquiry in relation to the hearsay evidence admitted by them.

Case referred to:—

(1) *Metropolitan Properties Co.* v. *Lannon* [1968] 3 W.L.R. 694, 707.

FEDERAL COURT

M. Shankar for the appellant,

Ajaib Singh (Senior Federal Counsel) for the respondents.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): A motion for an order of *certiorari*, to quash the decision of the Public Services Commission terminating the appellant's appointment, was dismissed by the High Court at Kuala Lumpur on February 7, 1969. The appellant now appeals to this court.

The appellant was a Junior Assistant Commissioner of Labour and as such an officer on the permanent establishment in Division II of the Public Service. On December 8, 1966 the Secretary to the Public Services Commission informed the appellant by letter that "his conduct appears to the Head of the Department to merit dismissal" and called upon him to exculpate himself. This letter, as pointed out, was sent through Dato' Yeap Kee Aik, then Secretary to the Ministry of Labour. As the appellant failed to exculpate himself satisfactorily, a committee was duly set up, under regulation 38(c) of General Orders, Cap. D, to enquire into the matter. The committee sat on November 27, 28 and 29, 1967, when hearing was adjourned, and resumed on March 5, 6 and 7, 1968.,

On November 28, 1967 the evidence of Mr. S. Kumar, the Commissioner for Labour, given in cross-examination, was as follows:—

"Q. The letter dated the 8th December 1966 to Sivam that his conduct appeared to the Head of Department to merit dismissal was sent through the Setia Usaha Kementerian Buroh?

A. Yes.

Q. Dato' Yeap Kee Aik was then the Secretary to the Ministry of Labour?

A. Yes.

Q. The letter was sent through him because it was he who reported to the Public Services Commission that it appeared to him that Sivam's conduct merited dismissal?

A. Yes.

Q. Did he make this report verbally or in writing?

A. He did it in writing by a letter dated the 26th October 1966.

Q. So the decision to initiate proceedings against Sivam was his and his alone?

A. Yes.

Q. But it is you who is Head of Department and not Dato' Yeap Kee Aik?

A. Yes, I am the Head of Department and not Dato' Yeap."

Thereupon counsel for the appellant raised an objection that the proceedings thus initiated were *ultra vires* and, on the following day, made a submission in writing to that effect. The point made was that, under regulation 38, the person concerned, to whom the conduct of a public officer appears to merit dismissal, should have been Mr. Kumar, the Commissioner for Labour, who was "the Head of Department", and not Dato' Yeap Kee Aik. Citing Professor S.A. de Smith's *Judicial Review of Admini-*

strative Action (1961) at page 61, that "if the repository of the power fails to comply with these requirements it acts *ultra vires*", it was contended that the proceedings should be stopped at that stage and the question of *ultra vires* disposed of first.

Faced with this problem the committee decided to adjourn to consider the submission. In reply to a letter by the appellant on December 28, 1967 seeking information as to the decision of the committee, the Secretary of the Public Services Commission replied on January 13, 1968 that the committee had decided to defer decision on the point pending completion of the inquiry. Upon its resumption on March 5, 1968 objection to the validity of the proceedings was again raised and put on record. Whatever the decision it was never communicated to the appellant. On April 30, 1968 he was notified of his dismissal.

The substantial question before this court was also the principal ground raised in support of the application to the High Court. The contention is that the proceedings before the Committee of Inquiry were instituted by the Secretary to the Ministry and not by the Head of Department. This was a violation of the provisions of regulation 38 of General Orders, Cap. D. Consequently the committee had no jurisdiction to entertain the matter and the proceedings were void. The regulation reads as follows:—

"38. If the conduct of an officer on the pensionable establishment in Division I or II of the Public Service appears to the Head of Department to merit dismissal, *the following procedure will be adopted,* unless the method of dismissal is otherwise provided for either in these regulations, or by special legislation."

The learned judge held, in my view quite rightly, that the procedural provisions set out thereunder should be treated as mandatory and strictly observed. He agreed that it was true Mr. Kumar was the Head of the Department of Labour and not Dato' Yeap Kee Aik, but the reasoning that followed has been criticised, in which it was said:—

"But the Department of Labour is one of many Departments in the Ministry of Labour. The overall administrative head of the Ministry is the Secretary. In the light of this observation the meaning to be attached to the provisions of G.O. 3(g) Cap. A is quite clear. The Secretary to the Ministry of Labour is also Head of Department. G.O. 3(g) reads: 'The term "Head of Department" shall be deemed to include a Secretary to a Minister or Ministry and the Principal Establishment Officer in respect of the services listed in sub-paragraph (a) of General Order 41'. It is said that the definition of Head of Department as defined in G.O. 3(g) Cap. A which deals with appointments and promotions is not applicable to the provisions under Cap. D i.e., conduct and discipline regulations. The fallacy lies in assuming that there are two different Heads of Departments one dealing with appointments and promotions and the other dealing with disciplinary proceedings. It is obvious that that is not the intention of the General Orders."

Before us it was argued that there was no evidence before the judge as to the numerous departments in the Ministry of Labour or that the overall head of the Ministry of Labour is the Secretary, contrary to the evidence of Mr. Kumar himself. Be that as it may, it is to be observed that the learned judge was more concerned with the intention of the General Orders, as to which he went on:—

"The true view is that while the mandatory provisions of G.O. 38 Cap. D must be strictly construed, the phrase 'appears to the Head of Department to merit dismissal' which precedes those provisions is only a machinery providing for the mode in which the question which can only be decided by the Disciplinary Authority is to come before them."

With respect I agree. Putting it another way, regulation 38, in my view, ought properly to be construed, as the judge did, in two parts, even though they are not dichotomous. First, there is the complaint; if accepted, it is followed by the inquiry. Impeachment proceedings, it was argued, might be initiated even by an office boy, unless the sole repository of the power to do so is held as restricted, in terms of the regulation, to the Head of Department. This argument by *reductio ad absurdum* cuts both ways. "Head of Department" not only bears the primary meaning, but also by implication excludes any irresponsible person. The Secretary to the Ministry, of course, is a responsible person, at least the equal in official status of a Head of Department. Moreover, he cannot set the machinery in motion, without disclosing adequate grounds of complaint, any more than the other can. I think both reasonableness as well as the object and intent of the provision should guide its interpretation. In my view the iron-clad rigidity of the procedure to be observed in the inquiry does not extend to what precedes it, namely, the initiation by complaint. Accordingly the proceedings were not invalid on that account. This disposes of grounds I to V of the memorandum of appeal.

The next ground of appeal relates to alleged non-observance of the rules of natural justice. It is said that these rules import the right to be informed of the decision of the committee on the objection to its jurisdiction — its denial was a serious procedural defect. The learned judge dealt with this point in his judgment as follows:—

"The committee did not shut its eyes to the issue. It considered the collateral question but indicated in its letter of 13th January 1968 that it 'had decided to defer its decision pending completion of the enquiry.' The fact that it completed the enquiry and submitted its report to the Disciplinary Authority is indicative of conduct amounting to rejection of counsel's submission. Regrettably that decision was never conveyed to the applicant. Is failure to do so a serious defect in procedure as to deprive it of jurisdiction? I think not. That cannot be equated with failure to consider the collateral question of jurisdiction or breach of the principles of natural

justice both of which are very serious defects which amount to deprivation of jurisdiction."

I share the same view. At any rate the committee did lend its ear to the objection raised to its jurisdiction by the written submission and even if, contrary to the view taken by the judge, the committee proceeded with the inquiry to completion without deciding whether or not it was competent to do so, it has been held, in this appeal, that the proceedings were not invalid by reason of being initiated by the Secretary of the Ministry.

On other aspects of the rules of natural justice, it was further argued that the letter of Dato' Yeap Kee Aik dated October 26, 1966 contained allegations of misconduct against the appellant which were not made the subject-matter of the charges preferred against him, with the result that the Public Services Commission was possibly influenced by extraneous considerations without giving him an opportunity to explain. The question is whether there is a reasonable impression of bias, or a real likelihood of bias: see *Metropolitan Properties Co. v. Lannon.*[1] For my part I am satisfied that the learned judge in no way misdirected himself on this point, and having seen the nature of the charges pursued before the committee and the appellant's explanation, I need say no more than that I have no reason to doubt that neither the committee nor the Public Services Commission was influenced in their decision by anything contained in Dato' Yeap's letter.

As to the complaint against reception of hearsay evidence concerning charges 4 to 8, it was said that the fourth, fifth and seventh charges related to loans which had nothing to do with the appellant's official position, that in the case of the sixth charge there was a letter from the alleged lender, which was never contradicted, stating that no money had passed, and that there was not the slightest evidence to show that the appellant had used his public position for his private advantage. I do not think that, having regard to the explanation given by the appellant regarding these transactions, I should be justified in rejecting the inferences drawn by the committee.

Accordingly this appeal fails and I would dismiss it with costs.

Gill and Ali F.JJ. concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

GOH YOKE v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Kuala Lumpur — Federal Court Criminal Appeal No. X. 22 of 1969]

Criminal Law and Procedure — Murder — Defence of insanity — Burden of proof on accused — Summing up of trial judge — Medical evidence not explained to jury — Penal Code, s. 84.

Penal Code, ss. 84, 300 & 302 — Murder — Defence of insanity.

This was an appeal against the conviction of the appellant for the murder of his son. On appeal it was argued that the summing up of the trial judge was defective. In his summing up the trial judge told the jury always to apply the standards of a reasonable man and in the course of the summing up he said: "You must always bear in mind that a person is presumed to be responsible for his action and the natural consequences thereof, unless he affirmatively proves that he is entitled to exemption from criminal liability." Later he said "Always bear in mind the question of burden of proof. The burden lies on the prosecution which has got to establish it. The burden on the defence is comparatively light."

Held: (1) for the normal presumption of sanity to prevail over evidence of insanity adduced by the defence, the evidence as a whole must be sufficient to exclude any reasonable doubt regarding the sanity of an accused person pleading unsoundness of mind as a defence;

(2) the burden on an accused person to prove insanity is no higher than the burden which rests upon a plaintiff or a defendant in civil proceedings;

(3) the summing up was therefore defective as the trial judge had failed to explain the medical evidence to the jury;

(4) for the above reasons the conviction and sentence must be set aside and an order made for the appellant to be confined in safe custody pending the order of the Governor of Malacca.

Cases referred to:—

(1) *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, 327.

(2) *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358, 365.

(3) *Parker* v. *The Queen* (1963-4) 37 A.L.J.R. 3, 11.

(4) *Regina* v. *Wallett* [1968] 2 W.L.R. 1199.

(5) *Yeo Ah Seng* v. *Public Prosecutor* [1967] 1 M.L.J. 231, 234.

(6) *Geron* v. *The Emperor* A.I.R. 1914 Cal. 120, 130.

(7) *Bratty* v. *Attorney-General for Northern Ireland* [1963] A.C. 386, 407.

(8) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.

(9) *Sodeman* v. *R.* [1936] 2 All E.R. 1138.

(10) *Chia Chan Bah* v. *The King* [1938] M.L.J. 147.

(11) *Reg.* v. *Terry* [1961] 2 W.L.R. 961, 965-6.

(12) *Jusoh* v. *Public Prosecutor* [1963] M.L.J. 84, 86.

(13) *Reg.* v. *Kemp* [1957] 1 Q.B. 399.

FEDERAL COURT

D.S. Nath for the appellant.

K. Somasundram (Senior Federal Counsel) for the respondent.